United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7166

IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 76-7166

SAMUEL MALLIS and FRANKLYN KURNICK,

Plaintiffs-Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, EUROPEAN-AMERICAN BANK & TRUST COMPANY, FRANKLIN NATIONAL BANK and THE BANKERS TRUST COMPANY,

Defendants-Appellees.

APPEAL FROM FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE EUROPEAN-AMERICAN BANK & TRUST COMPANY, AND MOTION FOR ATTORNEYS' FEES AND DOUBLE COSTS

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Preliminary Statement

The plaintiffs-appellants ("plaintiffs") are two dentists who borrowed $156,000 from Franklin National Bank ("Franklin") and then, for a $50,000 fee, reloaned it for a short term to third parties. These third parties purchased certain invalid stock certificates with the funds and did not repay plaintiffs as the certificates proved worthless. Plaintiffs sought by this action to avoid repayment of the loan they took from Franklin.

European-American Bank & Trust Company ("European-American") is involved solely because it purchased plaintiffs' notes from Franklin's receiver, The Federal Deposit Insurance Corporation ("FDIC"). Plaintiffs do not dispute that European-American acquired the notes for value, in good faith, and without any constructive or actual knowledge of the third-party loans in which plaintiffs were involved.

Plaintiffs' claim against European-American, based on Regulation U,[1] has not even arguable merit; there are at least four absolute and independently sufficient defenses available on the face of the regulation and the statute. Regulation U prohibits banks from making loans for the purchase of "margin stock" if the loans are inadequately collateralized by stock. On its face the regulation does not apply because:

1) plaintiffs did not purchase any stock—rather, plaintiffs loaned money to others who purchased stock;

2) the loans from Franklin were not inadequately collateralized by stock—indeed the loans were initially made solely upon the plaintiffs' general credit, and the later renewals were secured primarily by savings passbooks; and,

3) "margin stock" was not involved in the transaction.

Plaintiffs are also precluded by the express provisions of the 1934 Act from asserting Regulation U as a defense to collection of the notes by European-American, which undisputably was a bona fide purchaser of the notes.

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[1] Regulation U, 12 C.F.R. Part 221, was promulgated by the Federal Reserve Board pursuant to § 7 of the Securities Exchange Act of 1934, 15 U.S.C. § 78g.

This appeal constitutes a misuse of the judicial process. Plaintiffs in their brief do not even bother to state disagreement with most of European-American's absolute defenses (*See* Plaintiffs' Brief, at 16-19). Plaintiffs do not appear to realize or care that the cost of litigation is not merely that of their own legal fees, but also that of the defendants and of this Court. Plaintiffs' understandable bitterness over their seduction into a foolhardy, get-rich-quick scheme cannot justify the expense to unrelated, innocent parties and to the judicial system. Accordingly, accompanying this brief European-American is submitting a motion to award it attorneys' fees and double costs.

Questions Presented

1. Whether § 29(c)(2) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(c)(2), prevents plaintiffs from asserting Regulation U as a defense to collection on these notes, which European-American acquired in good faith, for value and without notice that the funds were used in connection with a purchase of securities.

2. If not, whether the District Court erred in holding Regulation U inapplicable to this transaction, which lacks each essential element of a Regulation U violation:

   A. Plaintiffs did not obtain the loans from Franklin for the purpose of purchasing or carrying stock;

   B. Plaintiffs do not allege that the loans from Franklin were inadequately secured by stock;

   C. The stock certificates in question did not represent "margin stock", as defined in 12 C.F.R. §§ 221.3(v) and 221.3 (*l*).

Statement of the Case

Opinion Below

The opinion below (176a-191a)[2] dismissing plaintiffs' claims against all defendants pursuant to F.R. Civ. P. 12(b)(6) is reported at 407 F. Supp. 7 (S.D.N.Y. 1975) (Pollack, J.).

The District Court dismissed plaintiffs' only claim against European-American (6a-10a) on the grounds that the proceeds of the Franklin loan were not used in connection with the acquisition of "margin stock" and that plaintiffs did not themselves use the proceeds to purchase or carry any stock, but rather reloaned the money to others. 407 F. Supp. at 10-11 (180a-184a). The court did not reach the other defenses asserted by European-American and the FDIC with respect to plaintiffs' claim against them.[3]

Statement of Facts

As is more fully set forth in the District Court opinion, 407 F. Supp. at 9-10 (177a-180a), plaintiffs, two dentists resident on Long Island, borrowed $156,000 from Frank-

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[2] References "(1a *et seq.*)" are to the printed Appendix.

[3] The District Court also dismissed plaintiffs' common law claims since the dismissal of the Regulation U claim eliminated the basis for pendent jurisdiction. However, it amended its opinion as to Franklin when the FDIC as receiver of Franklin pointed out that its status as a government agency provided a basis for federal jurisdiction. 407 F. Supp. at 13. The Court also dismissed plaintiffs' separate claim against Bankers Trust Company. 407 F. Supp. at 11-13 (185a-191a).

Subsequently, plaintiffs dismissed their claim against FDIC and stipulated not to seek any relief from Franklin.

lin in March, 1972 (177a-178a). They in turn reloaned the money to third parties (the "Fowler Group") who used the funds to purchase stock certificates of Equity National Industries, Inc. ("Equity National"), and who promised plaintiffs a $50,000 fee for this accommodation (178a-179a). The Fowler Group apparently did not repay plaintiffs.

Plaintiffs' loans from Franklin, while originally unsecured, on later renewals by Franklin were collateralized by "bankbooks, negotiable securities, etc." (20a). Plaintiffs do not claim that the loans by Franklin were collateralized by the Equity National Certificates, or that they used the funds obtained from Franklin to purchase any stock of Equity National. Rather, plaintiffs say that their re-loan to the Fowler Group gave plaintiffs a security interest in the Certificates (8a, 19a).

The Equity National Certificates purchased by the Fowler Group had originally been given conditionally to Jerome and Judith Kates (the "Kates") pursuant to the acquisition by Equity National of a corporation controlled by the Kates (178a-179a). The Certificates bore several restrictive legends to the effect that they were not registered and could not be "sold, transferred, pledged or hypothecated". The Certificates would not become share certificates unless and until the company which the Kates sold to Equity National proved of value by virtue of its subsequent profitability. (34a, 179a)

On or about March 1, 1971, or approximately one year *before* plaintiffs loaned money to the Fowler Group so that the latter could purchase the Equity National Certificates, Equity National had determined not to issue any

shares to the Kates and recalled the Certificates (179a). Accordingly, the Certificates when purchased by the Fowler Group represented no equity interest whatsoever in Equity National Industries. At no time did the Certificates ever represent any shares which were "registered" on any national exchange, although other common shares of Equity, which had been issued, were listed and traded on the American Stock Exchange (181a-182a, 117a-119a).

Pursuant to a Purchase and Assumption Agreement dated October 8, 1974 (49a-116a), and with no knowledge of the transaction described above, European-American purchased the notes plaintiffs had given to Franklin from Franklin's receiver, the FDIC.

This action was commenced on February 24, 1975.

Argument

In the proceedings below European-American and the FDIC briefed at least four dispositive defenses to plaintiffs' Regulation U claim; two of these defenses were discussed by the District Court. Plaintiffs in their brief on appeal, however, have choosen to address only one of these arguments (at 16-19).[4]

[4] The organization of plaintiffs' brief does not obviously distinguish between the defendants: Point I of plaintiffs' brief is addressed to their separate claim against defendant Banker's Trust; Point II, to European-American and Franklin.

I.

Plaintiffs' claim against European-American is precluded by § 29(c)(2) of the 1934 Act.

Section 29(c)(2) of the 1934 Act provides that the terms of that Act may not be used to afford a defense to the collection of a debt against a party who "acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation . . ."[5] Regulation U, promulgated pursuant to § 7 of the 1934 Act, is subject to the provisions of that Act.

European-American purchased the notes made by plaintiffs from Franklin's receiver, the FDIC. Nowhere on the face of the loan documentation was there any indication that the loans were made for the purpose of purchasing stock *or* that the loans were collateralized by securities in violation of the margin requirements. On its face and in fact this loan had not even the remotest connection with Regulation U.

Plaintiffs do not allege that European-American acquired this obligation other than "in good faith for value," and the record is to the contrary (48a-51a); nor do plaintiffs allege that European-American had "actual knowledge of the violation", another requirement of § 29 (c)(2).

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[5] "(c) Nothing in this chapter shall be construed

* * *

(2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation or lien in good faith for value and without actual knowledge of the violation of any provision of this chapter or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien."

Since European-American bought plaintiffs' notes for value and with no knowledge of any irregularities, § 29(c)(2) mandates that Regulation U shall not "afford a defense to the collection of [this] debt." The dismissal of the action as against European-American must be affirmed.

II.

Regulation U is not applicable to this loan.

A. Plaintiffs Obtained The Loans Not To Purchase Or Carry Stock But To Enable Plaintiffs To Make A Loan To A Third Party.

Regulation U applies only to "purpose credit"—*i.e.*, bank loans obtained "for the purpose of purchasing or carrying . . . stock."[6] Plaintiffs state repeatedly that the purpose of the loans was to enable them, not to purchase stock, but to lend money to the Fowler Group (*e.g.*, 8a, 19a, 44a, 45a).[7]

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[6] "(a) *Purpose credit secured by stock.* (1) Except as provided in subparagraph (2) of this paragraph and in § 221.3(q) no bank shall extend any credit secured directly or indirectly by any stock *for the purpose of purchasing or carrying any margin stock* in an amount exceeding the maximum loan value of the collateral . . . ." 12 C.F.R. § 221.1(a) (footnotes omitted) (Emphasis added.)

[7] The nature of the risks assumed by plaintiffs and the returns anticipated by them were certainly not those of purchasers of stock. Plaintiffs' gain was fixed at a $50,000 finder's fee (17a-18a, Plaintiffs' Brief at 4), which, although a huge return on a short term "investment", was only a small percentage of the profits anticipated by the Fowler Group upon resale of the Certificates (172a, Plaintiffs' Brief at 4). The funds "advanced" by plaintiffs constituted less than 100 percent of the capital (17a) and were repayable to them within thirty days (18a, 20a). Plaintiffs' entitlement to both the return of their "advance" and the payment of the finder's fee was absolute and did not depend upon whether the Fowler Group realized profit from resale of the Certificates (19a). The Certificates were not to be assigned or otherwise transferred to plaintiffs, but merely were to be held by plaintiffs as collateral for their "advance" to the Fowler Group (19a).

Regulation U applies in only one circumstance to loans made to a borrower who relends the proceeds to a third person. Such a loan is "purpose credit" only if made to borrowers who are "engaged principally * * * in the business of extending credit for the purpose of purchasing or carrying margin stocks * * *", 12 C.F.R. § 221.3(q). Plaintiffs do not claim that they are persons within § 221.3(q). To the contrary, they allege that they are "dentists, unfamiliar with financial matters" (Plaintiffs' Brief at 3).

The loans obtained by plaintiffs do not constitute "purpose credit" and are not subject to Regulation U.

B. Plaintiffs Do Not Allege That The Loans Were Secured By Stock, Nor Do They Address The Question Of Valuation Of Collateral.

Regulation U is violated only if "purpose credit" is "secured directly or indirectly by any stock" and the amount of the loan "exceed[s] the maximum loan value of the collateral, as prescribed from time to time for stocks in § 221.4 * * *." 12 C.F.R. § 221.1(a) (footnotes omitted).

Plaintiffs' allegations as to whether stock was used for security are evasive. Plaintiffs state that their loan to the Fowler Group was secured by the Equity Certificates (8a), but nowhere do they allege that Franklin looked to the Certificates as security for Franklin's loan to plaintiffs. Indeed, plaintiffs allege that the Certificates were held by them, not by Franklin (173a). Nor do plaintiffs allege that their indebtedness to Franklin was secured by any other stock. Plaintiffs say only that the loans from Franklin were originally unsecured (20a, Plaintiffs' Brief at 5),

and that Franklin at some unspecified time took collateral consisting of "bankbooks, securities, etc." (9a)

Plaintiffs also fail to address the question of valuation of collateral. Even if the loans obtained by them from Franklin were secured by stock, if the amount of the loans was no greater than the "maximum loan value of the collateral," determined as prescribed by Regulation U, 12 C.F.R. §§ 221.3(s), 221.4, there would be no violation of Regulation U.

The facts relating to the nature and the value of the collateral taken to secure Franklin's loans are within plaintiffs' knowledge. Plaintiffs' total avoidance of what is the crux of Regulation U—to prevent loans to purchase stock that are inadequately secured by stock—means that they are unable also to satisfy this essential element of a Regulation U violation.

C. The Certificates Do Not Represent Margin Stock.

A loan given by a bank which is used by the borrower to purchase stock is not subject to Regulation U if the stock purchased is not "margin stock," as defined in 12 C.F.R. § 221.3(v):

> "The term 'margin stock' means any stock which is (1) a stock registered on a national securities exchange, (2) a OTC margin stock, (3) a debt security (i) convertible with or without consideration, presently or in the future, into a margin stock * * *." (footnote omitted)

Plaintiffs assert that the Equity National Certificates represented either "stock registered on a national securities

exchange" or "a debt security" (Plaintiffs' Brief at 16-19). Indeed, this is the only one of European-American's numerous defenses that plaintiffs address.

Plaintiffs' assertion that the Certificates in question represent "a debt security" is contradicted by the Certificates themselves, which purport to represent common stock ownership (31a, 34a), not debt instruments. Nor do the Certificates provide any of the normal indicia of a debt security, such as provisions for payment of interest.

The Certificates do not represent "margin stock" also because they do not represent "stock registered on a national securities exchange":

(i) The Certificates do not represent "stock" within the meaning of Regulation U.

"Stock" is defined in 12 C.F.R. § 221.3(*l*) as either a present equitable interest in a company or a right to acquire such an interest.[8]

Approximately one year before plaintiffs entered into their transaction with the Fowler Group, Equity had determined that the conditions precedent to the Certificates' validity had not occurred, and had repudiated any interest that might have been represented by the Certificates and demanded their return. Thus, when the plaintiffs acquired their interest in the Certificates, the Certificates did not represent any ownership of, or any right to own, the com-

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[8] "(*l*) Stock. The term 'stock' includes any security commonly known as a stock . . . and any security convertible, with or without consideration, presently or in the future, into such security, certificate or other instrument, or carrying any warrant or right to subscribe to or purchase such a security. . . ."

mon "stock" of Equity National,[9] and Regulation U is inapplicable.

(ii) The Certificates did not represent stock "registered on a national securities exchange".

Equity National Industries issued outstanding common shares which it listed on the American Stock Exchange, but the Certificates in question did not represent shares that were ever listed or traded on a national securities exchange (181a-182a, 117a-119a).

The Federal Reserve Board has stated that loans to purchase unregistered stock do not become subject to Regulation U until such stock is registered. 1956 Federal Reserve Board Bulletin 117; 1937 Federal Reserve Board Bulletin 995 (attached hereto as Appendix A). And stock is not "registered on a national securities exchange" within the meaning of Regulation U until it is listed on an exchange. 1956 Federal Reserve Board Bulletin 117. Plaintiffs do not dispute that these Certificates did not represent shares that were ever listed. Thus, Regulation U is inapplicable also for this reason.

Plaintiffs refer in their brief (at 18) to a letter by a staff attorney of the Federal Reserve Board (20a). Judge Pollack dismissed the letter because the question posed to that attorney by plaintiffs' attorney is vague and off-the-point. 407 F. Supp. at 11 (183a) (the letter of request is attached as Appendix B). The question posed—whether shares may be "margin stock" if exempt from registration under the 1933 Act—is irrelevant in this case. Exempt shares may be subject to Regulation U because, in certain circum-

[9] There is substantial doubt whether the Certificates represented "stock" even prior to March 1971, since their value was from their genesis dependent upon the occurrence of conditions precedent.

stances, exempt shares can be listed and traded on a national exchange.[19] If the shares are not listed and traded—as the Certificates in question could not be—they do not constitute "margin stock".

Conclusion

For the reasons stated, the order of the District Court dismissing the complaint should be affirmed.

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[19] The reference in the letter from the Federal Reserve Staff attorney to "registration" under Regulation 12(d)1-1, if implying an equivalence to "registration" under Regulation U, must be rejected. 1956 Federal Reserve Board Bulletin 117.

The purpose of Section 12 of the 1934 Act is to require an issuer seeking to introduce a new class of securities on an exchange to disclose to the exchange and to the public pertinent information concerning the issuer. In that context, Reg. 12(d)1-1 states that registration of a class is "deemed" to be effective as to all shares of the class thereafter authorized and issued.

The expansive scope of securities "deemed" registered by Reg. 12(d)1-1 is broader than that found in Regulation U, a wholly unrelated regulation which controls the extension of credit in connection with the purchase of securities regularly traded by the public. The definition of "margin stock" in Regulation U is intended to limit applicability of the regulation to stocks which are publicly traded in substantial volume. A definition of the term "registered" which would include shares which have not actually been listed, and which in fact cannot be traded on an exchange, would be inconsistent with the scheme of the regulation.

APPENDIX A

PUBLISHED INTERPRETATIONS
OF THE
BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM

COMPILED UNDER THE DIRECTION OF THE BOARD
IN THE BOARD'S LEGAL DIVISION

¶ 6435. Loan to purchase stock which becomes registered after loan has been made.—The regulation is applicable, with certain exceptions, to any loan initially made for the purpose of purchasing or carrying a stock "registered on a national securities exchange" and the phrase quoted has reference to the present status of the stock. Accordingly, a loan for the purpose of purchasing or carrying a particular stock is for the purpose of purchasing or carrying a registered stock if that particular stock is now registered; and this is true even if the stock were not registered at the time the loan was originally made, as would be the case, for example, if the loan had been made prior to the enactment of the Securities Exchange Act of 1934. 1937 BULLETIN 995.

¶ 6440. Loan to purchase newly issued stock.—The Board recently was asked whether a loan by a bank to enable the borrower to purchase a newly issued stock during the initial over-the-counter trading period prior to the stock becoming registered (listed) on a national securities exchange would be subject to the Board's Regulation

U. The Board replied that, until such stock is so registered, the regulation would not be applicable to such a loan.

The Board now has been asked what the position of the lending bank would be under the regulation if, after the date on which the stock should become registered, such bank continued to hold a loan of the kind just described. It is assumed that the loan was in an amount greater than the maximum loan value for the collateral specified in the regulation.

If the stock should become registered, the loan would then be for the purpose of purchasing or carrying a registered stock, and, if secured directly or indirectly by any stock, would be subject to the regulation as from the date the stock was registered. Under the present regulation, this does not mean that the bank would have to obtain reduction of the loan in order to reduce it to an amount no more than the specified maximum loan value. It does mean, however, that so long as the loan balance exceeded the specified maximum loan value, the bank could not permit any withdrawals or substitutions of collateral that would increase such excess; nor could the bank increase the amount of the loan balance unless there was provided additional collateral having a maximum loan value at least equal to the amount of the increase. In other words, as from the date the stock should become registered, the loan would be subject to the regulation in exactly the same way, for example, as a loan subject to the regulation that became under-margined because of a decline in the current market value of the loan collateral or because of a decrease by the Board in the maximum loan value of the loan collateral. 1956 BULLETIN 117; 12 CFR 221.108.

APPENDIX B

May 16, 1975

MICHAEL A. GREENSPAN, *Assistant Secretary*
Board of Governors of the Federal Reserve System
Washington, D. C.

Dear Mr. Greenspan:

I would like to know whether the Board of Governors has taken any position or issued any interpretive releases regarding the definition of the term "Margin Stock", as the term is employed in Regulation U, with respect to securities which have been issued or transferred pursuant to Section 4(2) of the Securities Act of 1933, where other securities of the same issuer are registered and listed and traded on a regularly organized Exchange such as the New York Stock Exchange. Given the purposes intended by Regulation U (as well as Regulation T and Regulation X). to restrict the amount of credit employed for the purpose of acquiring, holding or carrying securities, it would seem to me that Regulation U would apply to the circumstances described. We have found no reported cases which have dealt with this precise issue.

An early response would be deeply appreciated.

Very truly yours,

NOEL W. HAUSER

NWH:SL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 76-7166

—o—

SAMUEL MALLIS and FRANKLYN KUPFERMAN,
Plaintiffs-Appellants,

against

FEDERAL DEPOSIT INSURANCE CORPORATION, EUROPEAN-AMERICAN BANK & TRUST COMPANY, FRANKLIN NATIONAL BANK and THE BANKERS TRUST COMPANY,
Defendants-Appellees.

—o—

MOTION OF DEFENDANT-APPELLEE EUROPEAN-AMERICAN BANK & TRUST COMPANY FOR ATTORNEYS' FEES AND DOUBLE COSTS

Pursuant to F.R. App. P. 38 and 28 U.S.C. § 1912, defendant-appellee European-American Bank & Trust Company ("European-American") hereby moves for attorneys' fees and double costs incurred defending this appeal.

As is fully set forth in the accompanying brief, plaintiffs have not even a colorable claim under Regulation U. Nor are the deficiencies in plaintiffs' claim technical in nature; to the contrary, they lie at the heart of Regulation U. For example, plaintiffs never even *allege* that their loan from Franklin was inadequately secured by stock. Moreover, the enabling statute gives European-American —undisputedly a bona fide purchaser—an absolute defense to this action, whether or not Regulation U applies.

The frivolity of plaintiffs' appeal is highlighted by the fact that these defenses, which were fully briefed by European-American in the court below, are not even discussed in plaintiffs' brief on appeal. Plaintiffs appeared

three times before the District Court, which gave plaintiffs numerous opportunities to present a viable claim; plaintiffs then had two conferences before the Staff Counsel to this Court, where these issues again were fully aired. Yet plaintiffs proceed on this appeal as if without education on the fundamentals of Regulation U. The appeal against European-American is vexatious and must be deemed to have been taken without a good faith belief in the merits of the appeal or in its chances for success

The award of double costs and attorneys' fees for frivolous appeals is within the discretion of this Court. 28 U.S.C. § 1912.[1] While the corollary Appellate Rule 38[2] is entitled "Damages For Delay", the rule "is not premised on a showing of delay in prosecuting an appeal . . . . Rather the determination is one of doing justice between the parties, of penalizing a party for unnecessarily wasting the time and resources of the court." *Fluoro Electric Corp.* v. *Branford Associates,* 489 F.2d 320, 326 (2d Cir. 1973). *See also Advisory Committee's Note to Rule 38,* 43 F.R.D. 155.

This Court has not hesitated in granting double costs and attorneys' fees where a frivolous appeal has not been taken with a good faith belief in its merit. In *Oscar Gruss & Son* v. *Lumbermans Mutual Casualty Co.,* 422 F.2d 1278, 1284 (2d Cir. 1970), the Court held that the frivolity of the issues being appealed and "the briefing of many in a manner that simply ignored the abundant evidence" jus-

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[1] "§ 1912. Damages and costs on affirmance

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

[2] "Rule 38. Damages For Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

tified an award to the appellee of double costs and attorneys' fees. *Accord, First National Ins. Co. of America* v. *Lynn*, 525 F.2d 1,3 (1st Cir. 1975), where the First Circuit imposed such a penalty because the appeal was without merit and because of the "half-hearted" way in which the issues were briefed; *see also Acevedo* v. *I.N.S.*, Dkt. No. 75-4246 (2d Cir. April 29, 1976); *Fluoro Electric Corp.* v. *Branford Associates, supra.*

This is a singularly appropriate situation for exercise of this Court's discretion to award double costs and attorneys' fees: there are independent and obvious reasons why the claim must fail; plaintiffs have no excuse of ignorance, as the issues have been fully discussed and briefed in the proceedings below; plaintiffs have ignored exhaustive efforts and entreaties of the Staff Counsel to this Court; and, plaintiffs have refused to brief the points which so obviously mandate affirmance. This appeal is a waste of the resources of this Court and a burden on the defendants.

Attorneys' fees and double costs should be granted.

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July 16, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL MALLIS and FRANKLYN KUPFERMAN,

Plaintiffs-Appellants,

against

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,

Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 16th day of July, 1976, he served two copies of Brief of Appellee Bankers Trust Company on See attached list, the attorneys for See attached list by delivering to and leaving same with a proper person in charge of their office at See attached list in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
16th day of July, 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978

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